IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 169/2001

Nazario Alfrede Magalhaes,
son of Antonio Rosai Magalhaes,
service, resident of Bairo Foro,
St. Estevem, House No.160/1,
Ilhas, Goa. ..... Appellant.

V/s.

Smt. Maria Fatima Varela,
wife of Nazario Alfrede Magalhaes
resident of Bairo Foro,
St. Estevem, Ilhas, Goa. ..... Respondent.

Mr. Sudin M. S. Usgaonkar, Advocate for the appellant.

Mr. M. S. Sonak, Advocate for the respondent.

CORAM : R.M. LODHA, J.

DATE : 19TH AUGUST, 2005.

ORAL JUDGMENT :

The parties are Goan. The appellant is the husband. The respondent is the wife. Their marriage was solemnized on 22.2.1977. Out of the wedlock, the son was born on 21.11.1978 and the daughter was born on 24.4.1981. Both the children were

born in Goa.

2. The husband on 10.3.1993 filed the suit against the wife and prayed for decree of divorce and dissolution of marriage on the ground of abandonment of conjugal domicile. The husband averred in the plaint that he being a seaman has to be on board ship for 9 months a year and that he gets leave for three months and during that time he stays in Goa. The husband alleged that the wife was unwilling to reside with him at the matrimonial home right from the inception of their marriage. She would complain that his house was too small to accommodate all the family members. The wife would say that she did not like to reside with the family members of the husband. The wife wanted the husband to stay with her parents who were living in the same village, viz. St. Estevam. Whenever the husband came on leave, the wife would pick up quarrels with him on flimsy grounds. During his absence, the wife would stay at her parents' place for months together. Despite persuasion by the husband, the behaviour of the wife did not improve. The wife last resided with him at the matrimonial home during his visit in the month of November, 1980, after which the wife completely abandoned the matrimonial home with an intention to bring an end to the matrimonial relationship. In the

year 1981, he constructed a new house which was hardly 50 metres away from the wife's parents house but despite the repeated request by him, the wife refused to join him. The husband, thus, set up the case for dissolution of marriage and divorce under Clause (5) of Article 4 of the Law of Divorce.

3. The wife contested the suit; filed written statement and traversed the allegations made in the plaint. In the written statement she set up the case that after few days of marriage, the husband left on board ship and returned only in the month of December, 1978. During that time she was ill-treated by the husband as well as by his mother. The husband again went on board ship in the month of May 1979 and he did not want her to stay in his house. He came to her parents house and told that he was going to take an appointment with the doctor to examine the child and and that he would come back to take them. He left but did not return. Thereafter, he came back in the month of April, 1980. She went to the matrimonial home on the date of his arrival and remained there until the month of November, 1980. The husband this time also did not allow her to stay in his house and told her that he did not want her to stay in the house. She gave birth to a girl child in the month of April, 1981. The husband then

came back in the month of September, 1981. However, he did not visit her nor did he see the girl child. The husband created an impression that if she came to his house, he would kill her. One of the sisters of the husband, out of compassion came to her house and tried to convince her to visit the matrimonial home. At that time she decided to go to the husband's house. However, the husband came to know about the intervention of his sister and he immediately wrote to her that he never requested anyone to plead with her in order to come and live with him. The husband returned in the month of December, 1982 and thereafter he started residing in his new house. The husband did not take her or the children to the new house. On the contrary, he made her feel that he did not want them and that he would kill them if they came to his house. The wife averred that the husband apparently was not willing to allow her or her children to reside in the conjugal domicile because of his illicit relations with one married lady by name Conceicao Fernandes. The wife alleged that the suit has been filed by the husband with the sole intention to get rid of her in view of his illicit relations with the said lady.

4. To complete the narration of facts, it may be noticed here that before filing the present suit, the husband had filed a suit for

divorce against the wife in the year 1983 on the ground of desertion. That suit was dismissed on account of non-completion of the prescribed period of separation.

5. On the basis of the pleadings of the parties, the trial Court framed the following issues :

1. Whether the plaintiff proves that the defendant has completely abandoned the conjugal domicile from November, 1980 till date and hence he is entitled for divorce under Article 4, clause (5) of the Law of Divorce ?

2. Whether the defendant proves that the suit is barred by principles of res judicata ?

3. Whether the defendant proves that the plaintiff is having illicit relation with another married lady by name Conceicao Fernandes who is residing in the newly constructed house of the plaintiff ?

6. The husband in support of his case examined himself as PW.1 and his sister Lorencin Silveria as PW.2. On the other hand, the wife examined herself as DW.1 and her sister Ana C. Verela as DW.2. The documentary evidence was also produced by the parties.

7. The learned Trial Judge held that the husband failed to prove abandonment, namely *animus deserendi.* Accordingly, the

trial Court decided issue No.1 against the husband. The defendant had given up issue No.2 and, therefore, no finding was recorded on that issue. On issue no. 3, the trial Court recorded that the husband had illicit relation with Conceicao Fernandes and decided issue No.3 against the husband. Consequently, by Judgment and Decree dated 30th July, 2001 the trial Judge dismissed the husband's suit. Aggrieved thereby, the husband is in appeal.

8. The learned Counsel for the appellant argued the appeal on the same lines the matter was argued on behalf of the husband before the trial Court and submitted that the ground of desertion as contemplated under the law was clearly proved by the husband. He relied upon the Judgment of the Supreme Court in the case of **Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi,** (2002) 1 SCC 308 and submitted that in the case in hand all the four ingredients that make out the ground of desertion in the context of matrimonial law are clearly made out. He argued that the factum of separation is proved. He would contend that from the evidence on record, it is established that the wife stayed away with an intention to bring cohabitation permanently to an end. He also

submitted that the husband did not give any consent to the wife to live separately nor the conduct of the husband is proved which may give reasonable cause to the wife leaving the matrimonial home to form an intention to bring cohabitation permanently to an end. He, thus, submitted that the findings recorded by the learned trial Judge were erroneous and needed to be corrected in appeal.

9. On the other hand, the learned Counsel for the wife supported the findings recorded by the learned trial Judge. He referred to the evidence of PW.2 and submitted that her evidence instead of supporting the case of the husband supports the plea set up by the wife that the husband was living in adultery. According to the learned Counsel for the wife, from the documentary evidence, namely (1) the electoral lists; and (2) the obituary advertisement, it is clearly established that the husband was living in adultery. The learned Counsel for the wife submitted that the findings recorded by the trial Judge are based on proper appreciation of evidence on record and warrant no interference.

10. Clause (5) of Article 4 of the Law of Divorce provides for ground of dissolution of marriage on complete abandonment of the

conjugal domicile for a period not less than three years. This provision is pari materia to the ground provided in Section 13(1)(i-b) of the Hindu Marriage Act, 1955. In relation to the ground of desertion provided in Section 13(1)(i-b) of the Hindu Marriage Act, 1955 in the case of A**dhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi (supra),** the Supreme Court considered its previous Judgments viz; (1) **Bipin Chander Jaisinghbhai Shah v. Prabhawati,** AIR 1957 SC 176; (2) **Lachman Utamchand Kirpalani v. Meena** AIR 1964 SC 40; (3) **Rohini Kumari v. Narendra Singh,** 1972 SCC (Cri) 1; and (4) **Chetan Dass v. Kamla Devi,** (2001) 4 SCC 250 and in paragraph 7 of the report, held thus :

> " 7. "Desertion" in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are :
>
> 1. the factum of separation;
>
> 2. the intention to bring cohabitation permanently to an end – *animus deserendi;*
>
> 3. the element of permanence which is a prima condition requires that both these essential ingredients should continue during the entire statutory period;
>
> The clause lays down the rule that desertion to amount to a matrimonial offence must be for a

> continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include "wilful neglect" of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

11. In the light of the aforesaid legal position, what I have to see in this Appeal is whether a case for abandonment of

the conjugal domicile for a period of not less than three years is proved by the husband.

12. The marriage between the parties was solemnized on 22.2.1977. They lived together for few days before the husband left on board ship. The first child was born out of the wedlock on 21.11.1977. In the years 1978 and 1979 when the husband came on leave and stayed in Goa, the wife stayed with him. Then the husband came to Goa in the month of April, 1980 and stayed upto the month of November, 1980. During this period also the wife stayed with the husband and conceived the child. She gave birth to their girl child in the month of April, 1981. The husband has admitted in his evidence that he came from ship in the month of September, 1981 and that he did not go to see his newly born child. His explanation was that he was mourning the death of his mother. This is hardly any explanation for not visiting the wife and the newly born child. The conduct of the husband towards his wife is reflected from the letters collectively marked Exhibit PW.1/B/D. The two letters were written by the husband in the months of April and June, 1978. The three letters are undated. A perusal thereof clearly indicates that the husband had no love for the wife, rather he developed hatred for her and wanted her not to return to his

house. The language used in these letters is filthy and vulgar. From these letters, if the wife got the impression that it was not safe for her to live with the husband, her apprehension cannot be said to be unfounded. Not only that, the husband is proved to be living in adultery. There is oral as well as documentary evidence to that effect. Exhibit PW.1/C/D is an advertisement in the newspaper `Herald' with respect to death of Regina Rodrigues. Regina Rodrigues was the mother of Conceicao Rodrigues. In the said advertisement, the plaintiff is shown to be the husband of Conceicao Rodrigues. In his evidence, the plaintiff admitted thus :

> "My name appears on the Advertisement in the daily Heraldo dated 14.7.95 with respect to the death of Regina Rodrigues. The witness is shown the Heraldo. The advertisement is admitted by him and the same is taken on record and marked as Exh. PW.1/C/D."

His explanation that Conceicao used to cook for him in the new house can hardly be accepted. The plaintiff did not ask the said Conceicao as to why in the advertisement he had been referred to as her husband. If the plaintiff and the said Conceicao Rodrigues were not living together as husband and wife, where was

the question of such advertisement. In the voters' list (Exhibit DW.1/A) the husband and Conceicao Rodrigues are shown to be the residents of the same house and their names appear one after another at serial nos. 451 and 452. The deposition of P.W.2 also shows that the plaintiff was living in adultery. P.W.2 is none else but the plaintiff's sister. The allegation of the misconduct of the husband towards the wife having been found to be correct, it cannot be said that the wife was staying away from the husband without reasonable cause.

13. In the case of **Chetan Dass v. Kamla Devi (supra)** the Supreme Court observed thus:

> **" 19.** In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the Courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained under Section 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let the things be not misunderstood nor any permissiveness under the law be inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite

> easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has been broken down. Lest the institution of marriage and the matrimonial bonds get fragile easily to be broken which may serve the purpose most welcome to the wrongdoer who, by heart, wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point."

14. The husband in the present case is the wrongdoer. He is living in adultery. He wants to take advantage of his own wrong. In this backdrop the finding of the learned trial Judge that the husband has miserably failed to prove the *animus deserendi* and his case of desertion in the context of the prevailing law is not at all established cannot be faulted.

15. The learned Counsel for the appellant strenuously urged that for more than 25 years the parties having been living separately and the marriage having been irretrievably broken down, it was a fit case for grant of decree of divorce and dissolution

of marriage. The learned Counsel relied upon the Judgment of the Supreme Court in the case of **V. Bhagat v. D. Bhagat (Mrs.),** (1994) 1 SCC 337. He pressed into service the following observations made by the Supreme Court :

> " ... It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under Section 13(1)(i-a) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years – detailed hereinbefore - we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter. "

16. I am afraid, the aforesaid observations of the Supreme Court can hardly be applied in the facts and circumstances of the present case where the husband is guilty of creating situation of separation. He is living in adultery and then seeking a decree of divorce and dissolution of marriage on the ground that the wife has

deserted him. In the case of **Chetan Dass v. Kamla Devi (supra),** the Supreme Court observed that the institution of marriage occupies an important place and role to play in the society, in general and, therefore, it would not be appropriate to apply any submission of `irretrievably broken marriage' as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the light of other facts and circumstances of the case. Having considered the facts of this case, I find no justification to accede to the prayer of the appellant to bring an end to the solemnized marriage between the parties on the ground that the marriage between the parties has been irretrievably broken down. This would be putting premium on the misconduct of the husband who is living in adultery.

17. The First Appeal, accordingly, has no merit and is dismissed with costs which I quantify at Rs.5,000/- .

R. M. LODHA, J.

ssm.